

March 5, 2018

**Submitted Via Federal eRulemaking Portal:** <http://www.regulations.gov>

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
Room N-5655  
200 Constitution Avenue NW, Washington, DC 20210  
Attention: Definition of Employer–Small Business Health Plans RIN 1210-AB85

**RE: Definition of “Employer” Under Section 3(5) of ERISA–Association Health Plans (RIN 1210-AB85)**

HR Policy Association (“HR Policy” or “the Association”) welcomes the opportunity to provide comments to the Department of Labor (DOL), Office of Regulations and Interpretations, Employee Benefits Security Administration regarding its request for comments on the proposed rule regarding the Definition of “Employer” Under Section 3(5) of ERISA–Association Health Plans (RIN 1210-AB85) that was published the Federal Register on January 5, 2018.<sup>1</sup>

HR Policy is the lead organization representing chief human resource officers of over 375 of the largest corporations doing business in the United States. The member companies provide health care coverage to over 21 million employees and dependents, and collectively spend more than \$76 billion annually on health care in the United States.

As you proceed with the Association Health Plan (AHP) rulemaking, HR Policy strongly recommends:

- In consultation with the Wage and Hour Division, the Department of the Treasury, and the Internal Revenue Service (IRS), the final rule should include language to ensure that employers who participate in an AHP are not considered joint employers under the Employee Retirement Income Security Act, the Fair Labor Standards Act (FLSA), or the Internal Revenue Code.
- In consultation with the Department of Health and Human Services (HHS), the Department of the Treasury, and the IRS, the final rule should clarify, as noted in the preamble, that only individual and small group market health insurance coverage is subject to the requirement to cover essential health benefits as defined under section 1302 of the Affordable Care Act (ACA) and that self-insured group health plans are exempt from these obligations under the minimum value standard as well.<sup>2</sup>

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<sup>1</sup> 83 Fed. Reg. 614.

<sup>2</sup> 83 Fed. Reg. 618.

Currently, there are almost as many different legal tests for who is a joint employer under the Fair Labor Standards Act as there are Circuit Courts of Appeal in the United States. Although federal employment law has traditionally found that a joint employer is one who exerts direct and immediate control over essential employment terms of other entities’ employees, the tests used to determine joint employment status by the courts have become increasingly vague. This ambiguity and lack of uniformity unnecessarily creates significant concern about when participating in an AHP would, or would not, trigger joint employment status for any employer. Employees in certain instances may be penalized by not being offered to participate in an AHP due to an employer’s concern that the extension of such benefits would make it a joint employer.

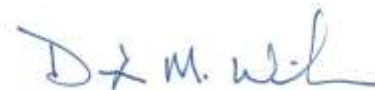
In order to maximize employer participation in AHPs and the benefits that these types of plans will provide to employees, the final rule should include language that ensures all employers are not at risk of joint employment liability based on participating in an AHP. To accomplish this, DOL should: 1) create a legal “safe harbor” against joint employer liability employees that participate in AHPs; and 2) publish a proposed rule to update the FLSA joint employment regulations.

Finally, the Association is pleased that DOL recognizes that only individual and small group health insurance coverage is required to cover essential health benefits as defined under section 1302 of the ACA. The Association strongly believes the expanded definition of minimum value that HHS and IRS adopted in 2015 is contrary to the plain language of the ACA.<sup>3</sup> The ACA only requires plans offered in the small group and individual markets to cover essential health benefits, and the 2015 final rules improperly impose a related mandate on self-insured and large-group employer-sponsored plans. The ACA does not specify, nor does it suggest that HHS, DOL, or the IRS have the statutory authority to specify what benefits must be covered by a self-insured and large-group employer sponsored plans in order to satisfy the ACA’s minimum value standard. The final AHP should recognize this. • In consultation with HHS and the IRS, the final rule should clarify that only individual and small group market health insurance coverage is subject to the requirement to cover essential health benefits and that self-insured group health plans are exempt from these obligations under the minimum value standard.

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We appreciate the opportunity to comment on the proposed rule. Please let me know if HR Policy can be of any further assistance.

Sincerely,



Mark Wilson  
Vice President, Health & Employment Policy  
HR Policy Association

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<sup>3</sup> 80 Fed. Reg. 10750 and 78971.